



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96928; File No. SR-CboeEDGX-2023-009]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt Order-to-Trade Ratio Fees

February 14, 2023.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”),² and Rule 19b-4 thereunder,³ notice is hereby given that on February 1, 2023, Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX Options”) proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (http://markets.cboe.com/us/options/regulation/rule_filings/edgx/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule to adopt Order-to-Trade Ratio Fees, effective February 1, 2023.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 18% of the market share and currently the Exchange represents only approximately 6% of the market share.⁴ Thus, in such a low-concentrated and highly competitive market, no single options exchange, including the Exchange, possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The Exchange proposes to adopt Order-to-Trade Ratio Fees. The proposed fees will be charged to market participants registered as Market Makers on EDGX Options based on the number of orders (including modification messages) entered compared to the number of orders traded in a calendar month. The calculation of the ratio will not include quotes or trades resulting

⁴ See Cboe Global Markets U.S. Options Market Monthly Volume Summary (January 23, 2023), available at https://markets.cboe.com/us/options/market_statistics/.

from such quotes. A Market Maker's order flow will be aggregated together with any affiliated Member sharing at least 75% common ownership. The proposed fees are as follows:

| Tier | Order-to-Trade Ratio | Fee |
|--------|----------------------|-----------|
| Tier 1 | 0 to 999 | \$0 |
| Tier 2 | 1,000 to 1,999 | \$2,500 |
| Tier 3 | 2,000 to 4,999 | \$5,000 |
| Tier 4 | 5,000 to 9,999 | \$10,500 |
| Tier 5 | 10,000 to 14,999 | \$35,000 |
| Tier 6 | 15,000 to 19,999 | \$100,000 |
| Tier 7 | 20,000 and above | \$150,000 |

The Exchange notes that market participants with incrementally higher order-to-trade ratios have the potential residual effect of exhausting system resources, bandwidth, and capacity. Higher order-to-trade ratios may, in turn, create latency and impact other Members' ability to receive timely executions. Recognizing Market Maker quoting activity is an important source of liquidity on exchanges, and that orders and executions often occur in large numbers, the purpose of this proposal is to focus on activity that is truly disproportionate while fairly allocating costs. The proposed fee structure has multiple thresholds, and the proposed fees are incrementally greater at higher order-to-trade ratios because the potential impact on exchange systems, bandwidth and capacity becomes greater with increased order-to-trade ratios. The proposal contemplates that a Market Maker would have to exceed the high order to trade ratio of 999 before that Market Maker would be charged a fee under the proposed tiers. The Exchange believes that it is in the interests of all Members and market participants who access the Exchange to not allow other market participants to exhaust System resources, but to encourage efficient usage of network capacity. The Exchange also believes this proposal will reduce the potential for market participants to engage in excessive order and trade activity that may require the Exchange to increase its storage capacity and will encourage such activity to be submitted in good faith for legitimate purposes.

The Exchange also represents that the proposed fees are not intended to raise revenue; rather, as noted above, it is intended to encourage efficient behavior so that market participants do not exhaust System resources. The Exchange also notes that it intends to provide Market Makers with daily reports, free of charge, which will detail their order and trade activity in order for those firms to be fully aware of all order and trade activity they (and their affiliates) are sending to the Exchange. This will allow firms to monitor their behavior and determine whether it is approaching any of the order-to-trade thresholds that trigger the proposed fees.

The Exchange lastly notes that other exchanges have adopted similar fee programs that assesses incrementally higher fees to Members that have incrementally higher order-to-trade ratios for similar reasons.⁵

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.⁶ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁷ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change

⁵ See e.g., Securities Exchange Act Release No. 60102 (June 11, 2009), 74 FR 29251 (June 19, 2009) (SR-NYSEArca-2009-50).

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

is consistent with the Section 6(b)(5)⁸ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

First, the Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange is only one of 16 options exchanges which market participants may direct their order flow and/or participate on as a Market-Maker, and it represents a small percentage of the overall market. Competing options exchanges similarly assess fees based on a Member's order-to-trade ratio.⁹

The Exchange believes adopting order-to-trade ratio fees is reasonable as unfettered usage of System capacity and network resource consumption can have a detrimental effect on all market participants who access and use the Exchange. As discussed, high order-to-trade ratios may adversely impact system resources, bandwidth, and capacity which may, in turn, create latency and impact other Members' ability to receive timely executions. The Exchange believes the proposed fees are therefore reasonable as they are designed to focus on activity that is truly disproportionate while fairly allocating costs.

The Exchange believes the proposed fees are also reasonable as Market Makers that do not exceed the high order to trade ratio of 999 will not be charged any fee under the proposed tiers. Quoting activity (and trades resulting from quotes) are also not included in the order-to-trade ratio, thereby ensuring Market Makers quoting activity, which acts as important source of liquidity, is not impeded by the proposal. The Exchange believes it's reasonable, equitable and not unfairly discriminatory to assess higher fees for greater higher order-to-trade ratios because the potential impact on exchange systems, bandwidth and capacity becomes greater with increased order-to-trade ratios. The Exchange believes the proposed fee amounts are reasonable and commensurate with the proposed thresholds as they are designed to incentivize Market

⁸ Id.

⁹ See e.g., NYSE Arca Options Fees and Charges, Ratio Threshold Fee.

Makers to reduce excessive order and trade activity that can be detrimental to all market participants and encourage such activity to be made in good faith and for legitimate purposes. Indeed, the Exchange believes that it is in the interests of all Members and market participants who access the Exchange to not allow other market participants to exhaust System resources, but to encourage efficient usage of network capacity. The Exchange therefore also believes that the proposed order-to-trade ratio fees appropriately reflect the benefits to different firms of being able to send orders into the Exchange's System and facilitates the Commission's goal of ensuring that critical market infrastructure has "levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets."¹⁰

The Exchange believes the proposed change is also equitable and not unfairly discriminatory because it applies uniformly to all Market Makers registered on EDGX Options. While the Exchange has no way of predicting with certainty how the proposed changes will impact Member activity, based on trading activity from the prior months, the Exchange anticipates that, absent any changes to Member behavior, the vast majority of Members will fall within proposed Tier 1 (and thus not be subject to any new fees). With respect to Market Makers that exceed this threshold, the Exchange anticipates, absent any change in behavior, approximately two Members will fall within Tier 2, one Member will fall within Tier 3, no Members will fall within Tiers 4 or 5 and one Member will fall within Tier 6 and no Members will fall within Tier 7. As discussed above however, the Exchange believes it's equitable and not unfairly discriminatory to assess incrementally higher fees for Market Makers that have higher order-to-trade ratios because the potential impact on exchange systems, bandwidth and capacity becomes greater with increased order-to-trade ratios. In addition, the Exchange believes that excluding quoting activity from the calculation of the ratio for the proposed fees is not unfairly

¹⁰ See Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72251 (December 5, 2014) (File No. S7-01-13) (Regulation SCI Adopting Release).

discriminatory because it will ensure Market Makers are able to continue providing important liquidity to the Exchange and meet their quoting obligations.

The Exchange lastly believes that its proposal is reasonable, equitably allocated and not unfairly discriminatory because it is not intended to raise revenue for the Exchange; rather, it is intended to encourage efficient behavior so that market participants do not exhaust System resources, while balancing the increase in order-to-trade ratio has seen from some market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In particular, the Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed fees applies uniformly to all Market Makers registered on EDGX Options. Further, any Market Maker who exceeds the order-to-trade ratio of 999 will be subject to a fee under the proposed tiers. The Exchange believes that the proposed change neither favors nor penalizes one or more categories of market participants in a manner that would impose an undue burden on competition. Rather, the proposal seeks to benefit all market participants by encouraging the efficient utilization of the Exchange's network while taking into account the important liquidity provided by Market Makers. As discussed above potential impact on exchange systems, bandwidth and capacity becomes greater with increased order-to-trade ratios. The Exchange also anticipates that the vast majority of Market Makers on the Exchange will not be subject to any fees under the proposed tiers. Accordingly, the Exchange believes that the proposed Excessive Quoting Fee does not favor certain categories of market participants in a manner that would impose a burden on competition.

The Exchange also believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the

Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues they may participate on and direct their order flow, including 15 other options exchanges. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 18% of the market share. Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchanges if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.” The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”. Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)¹¹ of the Act and subparagraph (f)(2) of Rule 19b-4¹² thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)¹³ of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CboeEDGX-2023-009 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CboeEDGX-2023-009. This file number should be included on the subject line if e-mail is used. To help the Commission process and

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f)(2).

¹³ 15 U.S.C. 78s(b)(2)(B).

review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeEDGX-2023-009, and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-03487 Filed: 2/17/2023 8:45 am; Publication Date: 2/21/2023]

¹⁴ 17 CFR 200.30-3(a)(12).